1992

Robert C. Larson v. PPG Industries, Inc., Diamond Shamrock Chemicals Company, Thatcher Chemical Company, Retep Corporation : Brief of Appellee

Utah Court of Appeals

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920711

IN THE COURT OF APPEALS OF THE

STATE OF UTAH

ROBERT C. LARSON, Plaintiffs and Appellants, vs. PPG INDUSTRIES, INC., a Pennsylvania corporation; DIAMOND SHAMROCK CHEMICALS COMPANY, a Delaware corporation; THATCHER CHEMICAL COMPANY a Utah corporation; WASATCH CHEMICAL COMPANY, a Utah corporation; and RETEP CORPORATION, a Utah corporation, Defendant and Respondent.	)	Case No. 920711-CA Priority No. 16

BRIEF OF APPELLEES PPG INDUSTRIES, INC. AND DIAMOND SHAMROCK CHEMICALS COMPANY

AN APPEAL FROM A SUMMARY JUDGMENT ENTERED
IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
THE HONORABLE JOHN A. ROKICH

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LIST OF ALL PARTIES

All parties to the appeal are shown on the case caption. The following parties were named as defendants below, but were dismissed prior to the appeal:

Thatcher Chemical Company, a Utah corporation, represented by Ford G. Scalley, David M. Carlson, Lori N. Jerman, of Morgan, Scalley & Reading, Salt Lake City.

Wasatch Chemical Company, a Utah corporation, represented by Gary B. Ferguson, Russell C. Fericks, and Brad C. Betebenner, of Richards, Brandt, Miller & Nelson, Salt Lake City.

Retep Corporation, a Utah corporation, represented by Robert R. Wallace, of Hanson, Epperson & Smith, and by McCoy A. McMurray. Alma G. Peterson, President of Retep, purported to appear pro se on behalf of the corporation at some hearings.

In addition to the counsel listed on the cover sheet, plaintiff has been represented in this proceeding by Fred R. Silvester, of Suitter, Axland, Armstrong & Hanson, Salt Lake City.

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JURISDICTION

The appeal is from a final judgment in a civil case. Jurisdiction is proper in this Court pursuant to Utah Code Ann. § 78-2a-3(2)(j), as amended. Prior to transfer, jurisdiction was proper in the Utah Supreme Court under Utah Code Ann. § 78-2-2(3)(j), as amended.

ISSUES PRESENTED ON APPEAL

1. Did the district court correctly rule that the statute of limitations ran on appellant's claims several years before his complaint was filed?

2. Did the district court correctly rule that plaintiff did not present sufficient evidence to raise a jury question regarding applicability of the "discovery rule" exception to the statute of limitations?

3. Was summary judgment appropriate in the absence of sufficient evidence to raise a jury question on whether exposure to TCE caused appellant's alleged injuries?

STANDARD OF APPELLATE REVIEW: The standard of review is the same for each of the issues presented on appeal. Summary judgment is appropriate if, viewing the evidence in a light most favorable to the nonmoving party, the moving party is nevertheless entitled to judgment as a matter of law. The district court's decision is reviewed by this Court for correctness. Warren v. Provo City Corp., 838 P.2d 1125, 1128 (Utah 1992).

STATUTES, RULES AND REGULATIONS

Utah Code Ann. § 78-12-1:

Time for commencement of actions generally.

Civil actions may be commenced only within the periods prescribed in this chapter, after the cause of action has accrued, except in specific cases where a different limitation is prescribed by statute.

Utah Code Ann. § 78-12-25(3):

Within four years.

An action for relief not otherwise provided for by law.

U.R.Civ.P. 56:

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

* * *

(c) **Motion and proceedings thereon.** . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

STATEMENT OF THE CASE

Nature of Case, Course of Proceedings, and Disposition Below

In 1988, plaintiff and appellant Robert Larson ("Larson") brought suit against appellees and others (hereinafter "PPG" collectively), alleging a myriad of physical and emotional problems

resulting from exposure to the chemical trichloroethylene ("TCE") from approximately 1964 until approximately 1972.[1]

The district court granted summary judgment to the defendants, ruling that Larson's claims were barred by the four-year statute of limitations, Utah Code Ann. § 78-12-25. The Court further noted that Larson had not adduced evidence to establish that his alleged injuries were caused by TCE. (R.531).

Statement of Uncontroverted Facts

The following facts were assumed true or uncontroverted in the court below:

Robert Larson began working for Black & Decker as a tool repairer in approximately May, 1964. (R.736; R.1249). Shortly thereafter, he married his present wife, Marilyn Larson ("Marilyn"). (R.802-803; R.1450-1451).

As a tool repairer for Black & Decker, Larson disassembled various power tools and, on occasion, cleaned those power tools in a vapor degreaser which utilized TCE. (R.737; R.752-753). Depending upon the particular day, Larson would lower tools into and out of the vapor degreaser as many as fifteen or twenty times. (R.752).

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[1] Although PPG and Diamond Shamrock manufactured TCE during this time frame, there was considerable doubt whether any of that TCE was sold to suppliers from whom Mr. Larson's employer, Black and Decker, purchased TCE. For purposes of the Motion for summary judgment granted by the district court, PPG and Diamond Shamrock assumed that the TCE to which Mr. Larson was allegedly exposed was manufactured by them.

An air purifying respirator and rubber gloves were available for workers using the vapor degreaser. The only time Larson ever used the air purifying respirator was to clean the vapor degreaser. (R.620-621; R.756; R.983-984; R.1028-1029; R.1145-1146; R.1167-1168). A washroom was immediately adjacent to the room in which the vapor degreaser was located but Larson rarely, if ever, washed his hands following his use of the various degreasers and solvents. (R.755; R.949-950; R.956).

Within a few months of the date he became employed at Black and Decker, Larson began to notice physical and emotional symptoms. He first noticed mood changes in the Summer of 1964. (R.764; R.1011-1012; R.1465-1467; R.1528). Larson began to suffer from bleeding sinuses in 1966 and has continued to suffer from this symptom since then. (R.776; R.1003-1004; R.1539-1540). Headaches began in late 1964 and have continued to the present time. (R.765; R.1536-1537).

Larson began experiencing irritation from smelling certain chemicals in 1965 or 1966. (R.777). He also began to suffer from dizziness in the time frame of 1964 through 1969. (R.813; R.1546-1547). Sometime in the 1960s Larson became impatient, and began to lose energy. (R.766-767; R.778-779; R.1547-1548).

In approximately 1969, Larson became the manager of Black and Decker's Salt Lake City facility. (R.737-378; R.758; R.1037; R.1456-1457). At about the same time that Larson became the manager, he also began to experience additional symptoms such as a

decreased sex drive, memory loss, slower reaction time, and difficulty in "prioritizing" tasks. (R.761; R.770-772; R.1009-1010; R.1040; R.1545-1546; R.1560-1561).

During the early 1970s, Larson became quite violent and emotionally and physically abusive with his family. (R.1481; R.1551). In 1986 Larson was demoted from manager to senior tool repairer. (R.614; R.634; R.774-775; R.994). He suffered depression as a result of this demotion. (R.774; R.1154).

In approximately 1972, Black and Decker ceased using the TCE vapor degreaser and switched to some other form of degreasing utilizing a cold solvent. (R.624; R.742; R.789; R.817; R.946-947; R.952-957; R.1036-1037; R.1487). Larson does not know the name of these new solvents to which he was exposed, or of any other solvents to which he has been exposed since that time. (R.742; R.945-948).

Larson does not trust doctors and sought no medical attention for any of his symptoms until early 1985. (R.785-788; R.1004-1006; R.1012-1013; R.1014-1015; R.1538-1539; R.1540-1543). His wife would occasionally ask the family doctor about Larson's symptoms when she was bringing children in for various problems. (R.783-786; R.1017-1018; R.1537-1538).

> Q. Okay. Do you remember when you first sought medical attention for your headaches?
>
> **A.** I am sure it was in the '60's, with Dr. Young.

Q. Would you have gone to him specifically for yourself on that occasion and said "I need you to fix my headaches," or "I've got a problem?"

A. Probably not. I kind of suffered along with stuff and went with my wife or kids or something,and like I said before, kind of asked him, "What about headaches?" But I don't remember a specific time of myself just going in and saying, you know, "We got to figure this out," you know, I didn't ever do that.

(R.1267).

Mrs. Larson testified that her husband refused to go to a doctor unless he considered the issue very serious, and that he didn't consider these matters serious:

Q. Did he seek medical attention for those headaches?

A. Our general practitioner, our general family doctor had, at different times, tried to have him take different things to, you know, try. Robert is not a person that wants to ever go to the doctor. I mean he didn't - you know, he wouldn't go in for a long time, but if he was in there for something else and I would say, you know, he has these terrible headaches, is there anything you can do for him. And so he would give him a prescription. . . .

* * * * *

Q. Did you seek - did he seek medical attention [for his bloody sinuses]?

A. Probably just through Dr. Young. He's the only doctor that Robert ever went to until we went to Dr. Lockey [in 1985].

Q. Weren't you concerned about the bloody sinuses?

A. Oh, yeah and -

Q. Was he concerned?

A. Well, I'm sure he was, but you have to know him to know - well, he will - you know, he has to fall down on the floor before he'll go to a doctor. I mean, that's

how bad he hates to go and so it isn't strange to me that he doesn't run to the doctor for things. It has to be really serious before he would ever go.

* * * * *

Q. Do you know why your husband was so reluctant to go to doctors?

A. Well, he gets nauseated when he walks into a hospital. Some people just do and some people don't. I don't know. You know, it's just something that he hates and he doesn't like, you know.

Q. He didn't have a traumatic experience with a doctor -

A. Oh, no.

Q. - when he was young?

A. In fact, he never went. In fact, I've asked his mother many times, you know, and she - he just never had to go to the doctor for any reason.

(R.1537-1538; R.1540; R.1542-1543).

The statement in Larson's brief that "[t]he Larsons consulted the family doctor concerning the headaches and the bloody sinuses" is not supported by the record citation:

A. . . . And then I have gone and seen Dr. Young through the years, and on one of my visits there I am sure I have asked him about it, you know, about the headaches. And I am sure asked him about that.

But we never ever said anything to him about trichloroethylene or anything. It would have been more just, you know, "What do you think causes it and -- where --

Q. Anything that you saw Dr. Young -- he's your family doctor, isn't he?

A. Yeah.

Q. Did you tell him what you did for a living?

A. I don't think so.

Q. Did he take a history from you; that is, ask you what you did and how old you were and what problems you had had in the past?

A. I don't think so. I think more a lot of the visits with him was going in for my wife or one of the kids, and lots of times, in passing, we would ask, "What about this? What about that?"

But many of the times we were there it was just -- maybe I didn't go over there for myself.

Q. Okay. If you discussed your own condition with Dr. Young, it was more incidental?

A. Correct.

(R.1006).

The Larsons assert that several years before filing the complaint in this action, they saw a television program concerning potential harmful effects of TCE. They are unable to recall the date of the alleged television program, the name of the program, the network on which the program aired or the identities of any of the personalities involved. (R.788-790; R.993-998; R.1457-1461). The Larsons alleged that as a result of seeing this unidentified television program concerning TCE and its potential effects on the human body, they concluded that Larson's physical and emotional symptomatology was likely due to his exposure to TCE in the mid-to-late 1960s and early 1970s. (R.788-790; R.800; R.993; R.995; R.1461; R.1484; R.1571; R.1574-1573).

After viewing the television program, Mrs. Larson began making inquiries of various health care providers on behalf of her

husband. (R.784-788; R.1528-1529). In early 1985, Larson began receiving medical evaluations to determine whether his symptoms were the result of TCE exposure. (R.994; R.1538-1539).

None of Larson's health care providers are able to state definitely that any of Larson's symptoms are the result of Larson's exposure to TCE. (R. 531).

Larson's current manager, Bruce Kjar, considers Larson to be an excellent repairer and to have an absolutely phenomenal memory. (R.630; R.641-642; R.665-666). He has observed no significant personality changes in Larson at work. (R.651; R.644) Any changes in mood or personality which he has observed date from the time Larson was demoted from manager. (R.679-680).

Larson's complaint with jury demand was filed on August 29, 1988, more than 20 years after Larson's initial exposure and first recognition of symptoms. (R.2).

By the time Larson filed his complaint, so much time had passed from the date of his initial exposure to TCE that neither his employer nor the defendants had records which would assist any of the parties in discovery. (R.536). Witnesses have disappeared and memories have faded over the past 20 years. Larson has been exposed to a number of other solvents and chemicals over the years, which would make it virtually impossible to determine whether his alleged symptoms are, or even could have been, caused by his exposure to TCE. (R.946-943; R.957; R.966-967).

Access to critical evidence has also been lost over the past twenty years. The vapor degreaser which Larson used is no longer available for inspection. It would be impossible, or nearly so, to determine whether Black & Decker used the vapor degreaser appropriately, whether it followed the manufacturer's recommendations, whether it followed the TCE manufacturer's recommendations, and whether the employees of Black & Decker were obedient to Black & Decker's policies concerning the use of TCE and vapor degreasers. (R.536).

SUMMARY OF ARGUMENT

Summary judgment was appropriate in this case because Larson's complaint was filed several years after the statute of limitations had run. Larson did not make the threshold showing of due diligence to avoid application of the statute, and did not establish special circumstances warranting application of the "discovery rule" exception. Summary judgment was also appropriate because Larson offered no medical testimony to establish that his alleged medical condition was caused by exposure to TCE, a requisite element beyond the knowledge of ordinary jurors.

ARGUMENT

I. THE STATUTE OF LIMITATIONS ON LARSON'S CLAIMS RAN MORE THAN TEN YEARS BEFORE LARSON FILED SUIT.

Larson's Complaint set forth claims sounding in negligence, breach of warranty and strict liability in tort. Pending resolution of the motion for summary judgment, Larson abandoned his

breach of warranty claim, focusing solely on the negligence and product liability claims.

Utah law provides that "an action for relief not otherwise provided for by law" must be brought within four years "after the cause of action has accrued." Utah Code Ann. §§ 78-12-1, 78-12-25(3). Section 78-12-25, and its similarly worded predecessors, have long been held to apply to claims sounding in negligence. Whatcott v. Whatcott, 790 P.2d 578, 579 n. 1 (Utah App. 1990); Peteler v. Robinson, 81 Utah 535, 17 P.2d 244, 246 (1933). Additionally, because there was no other statute of limitations applicable to product liability claims, Section 78-12-25(3) would also apply to those claims.[2]

It is well established in Utah that a cause of action accrues, and the statute of limitations begins to run, "upon the happening of the last event necessary to complete the cause of action . . ." Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992), *quoting* Myers v. McDonald, 635 P.2d 84, 86 (Utah 1981). "A tort cause of action accrues when all its elements come into being and the claim is actionable." Retherford v. AT&T Communications, 844 P.2d 949, 975 (Utah 1992).

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[2] At the time Larson filed his complaint, the former version of the product liability statute had been declared unconstitutional by the Utah Supreme Court. Berry v. Beech Aircraft, 717 P.2d 670 (Utah 1985). The current statute, which requires suit to be filed within two years from the date a plaintiff knows or should know of the defect, had not yet been enacted. (See Utah Code Ann. § 78-15-1, *et seq.*)

"In traditional negligence cases, a cause of action accrues when all the elements necessary to maintenance of a lawsuit are present; the time of occurrence of the last of those elements is made the critical point of initial inquiry." Payne by and through Payne v. Myers, 743 P.2d 186, 189 (Utah 1987). The "last of those elements" in a negligence case is harm or injury. *Id.* at 189-90; Williams v. Melby, 699 P.2d 723, 726 (Utah 1985) (elements of negligence claim are duty, breach, causation, and damages). All the elements of a product liability claim are present if a person who is engaged in the business sells a defective and unreasonably dangerous product which is expected to, and does, reach the consumer without substantial change, and the product causes harm. Ernest W. Hahn, Inc. v. Armco Steel Co., 601 P.2d 152, 156 (Utah 1979); Restatement (Second) of Torts § 402A.

Thus, in both negligence and product liability causes of action, the last event necessary to render a situation actionable is injury. At the very latest, therefore, Larson's complaint should have been filed no more than four years from the date his last symptom manifested itself. The parties agree that all of the symptoms from which Larson now suffers had manifested themselves by the time he was appointed to manage the Salt Lake office of Black & Decker, some time during the early 1970s. (R.558). Accordingly,

Larson's lawsuit was filed approximately 10 or 15 years too late under even the most liberal interpretation of his circumstances.[3]

Larson seeks to avoid application of the general rule, however, by arguing that the statute of limitations in a product liability case does not begin to run until the plaintiff "become[s] aware of the causal relationship between the injury and the prospective defendant." (Brief of Appellant, p.10). Larson then asserts that a jury question exists as to when he first gained that knowledge.

In support of this argument, Larson cites Foil v. Ballinger, 601 P.2d 144 (Utah 1979) and Deschamps v. Pulley, 784 P.2d 471 (Utah App. 1988), both of which addressed the statute of limitations governing medical malpractice claims, Utah Code Ann. § 78-14-4. Under that section, the statute of limitations in a medical malpractice case is "two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury . . ."

In Foil, the Utah Supreme Court held that the word "injury" in Section 78-14-4 means "legal injury." In other words, the statute of limitations on a medical malpractice claim does not begin to run

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[3] In actuality, Larson's cause of action accrued several years earlier, when he first began experiencing major symptoms in the late 1960s. Under the majority rule, once a substantial injury is manifested, the statute of limitations begins to run, even as to later discovered injuries. *See, e.g.*, Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 229 (5th Cir. 1984); Restatement (Second) of Torts § 899 Comments c & e, § 910.

until a plaintiff knows, or reasonably could have learned, of the injury and its possible negligent cause. *Id.*

As this Court noted in Deschamps, the Supreme Court's holding in Foil was based upon "concerns with the filing of unfounded claims and the temptation for health care providers to fail to advise patients of mistakes until after the limitations period has run . . ." Deschamps, *supra*, 784 P.2d at 473. This Court has cited similar concerns in extending the modified accrual rule to legal malpractice cases. In Merkley v. Beaslin, 778 P.2d 16, 19 (Utah App. 1989), the Court wrote, "[w]e think that fundamental fairness also requires the imposition of the discovery rule because the attorney-client relationship is based upon trust, and is a situation in which one less knowledgeable must rely on another, who has special expertise, for advice and assistance." The Court quoted favorably from a decision issued by the Massachusetts Supreme Court: "The attorney, like the doctor, is an expert, and much of his work is done out of the client's view. The client is not an expert; he cannot be expected to recognize professional negligence if he sees it, and he should not be expected to watch over the professional or to retain a second professional to do so." *Id.*, quoting Hendrickson v. Sears, 365 Mass. 83, 310 N.E.2d 131, 135 (1974).

Foil and Merkley thus recognize a unique circumstance presented in professional malpractice cases: it is often the potential defendant upon whom plaintiff will rely for information

about his or her status. *See*, Stewart v. K&S Co., Inc., 591 P.2d 433, 435 (Utah 1979) ("[w]here there is a fiduciary relationship, such as between corporate officers and a stockholder, the statute of limitations does not begin to run until the stockholder discovers, or in the exercise of reasonable care should discover, that there is a wrong to be complained of . . .").

In product liability cases involving personal injury, a plaintiff ordinarily will, and should, receive information necessary to know whether there is a cause of action from a neutral third party, namely a health care provider. There is no inherent conflict, and no affront to "fundamental fairness."

Absent those considerations, the long-standing rule regarding accrual of tort actions applies to Larson's claims. Under precedent of this Court and the Utah Supreme Court, Larson's negligence and product liability causes of action arose, and the four-year statute of limitations began to run, in the early 1970s.

Larson urges the Court, however, to apply a different standard espoused by courts in other jurisdictions. In particular, Larson points to Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980) (applying Oklahoma law) and Pereira v. Dow Chemical Company, Inc., 129 Cal.App.3d 865, 181 Cal.Rptr. 364 (Cal.App. 1982).

Larson's reliance on those cases is misplaced. The Utah Supreme Court has consistently explained the role and requirements of the discovery rule under Utah law. While Williams and Pereira cast the discovery rule in terms of when the cause of action

accrues, Utah recognizes the role of the discovery rule as an exception to, not an extension of, statutorily prescribed limitation periods. Except in cases involving relationships of trust, notably those involving professional malpractice, Utah applies the traditional rule of accrual to determine when a statute of limitations has run. Plaintiffs are not left without protection, however. If exceptional circumstances exist by which a plaintiff should be relieved of the uniform effects of a statute of limitations, plaintiffs may seek application of the discovery rule.

The primary distinction between Utah's established system and that employed in Oklahoma or elsewhere is that Utah recognizes and preserves to a greater extent the purpose of statutes of limitations. A limitation period reflects a reasonable amount of time during which defendants should be on notice and at risk. If a plaintiff seeks to bring an action beyond that prescribed time, it is logical and fair to expect the plaintiff to demonstrate why he or she should be allowed. As discussed below in Points II and III, the Utah Supreme Court has outlined the procedure and burden a plaintiff must meet to invoke the discovery rule. Plaintiffs should not be permitted to circumvent those mandates by labeling their request as one for modification of normal accrual principles.

Even if Larson's application of medical malpractice accrual principles were appropriate to his product liability and negligence claims, those claims would not be saved in any event. Larson

failed to raise a genuine issue of material fact regarding when he knew, or should have known, of the possible cause of his injuries.[4] The district court determined from the Larsons' own testimony that a reasonable jury could not conclude Larson had acted with reasonable diligence. That conclusion is dispositive of Larson's accrual argument, regardless of how characterized.[5]

II. LARSON FAILED TO MAKE A THRESHOLD SHOWING OF DUE DILIGENCE TO AVOID APPLICATION OF THE STATUTE OF LIMITATIONS.

Larson seeks to avoid the effect of the statute of limitations by arguing that the "discovery rule" should be applied to excuse his untimely filing. The district court agreed with Larson that "in some instances the statute does not begin to run until discovery of the cause of the injury is made by the claimant." However, the district court concluded that, based upon the undisputed facts and evidence adduced, no reasonable jury could

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[4] Deschamps clarified that the medical malpractice statute is triggered by notice of a *possible*, not *probable*, cause.

[5] In the court below, Larson attempted to cure his statute of limitations problems by claiming that he did not understand that TCE could cause his symptoms until watching an unidentified television program in 1984. Larson alleged that his lawsuit was filed within four years from the date of that television program. However, as the district court noted, "[Larson] has been unable to ascertain the date he and his wife saw the television program in which the effects of TCE were discussed." (R.531). PPG after extensive investigation, was unable to locate any reference to the alleged broadcast. (R.587-592). Larson's failure to recall or offer evidence of any details regarding the claimed 1984 television program, such as the date upon which it aired, the network, or any other identifying information, made it impossible to test the validity of his claim, and was insufficient to take this claim of late discovery outside the realm of speculation.

find that Larson's complaint was filed within four years of when plaintiff knew or should have known of his potential cause of action. (R.535-36).

On appeal, Larson argues that a jury could find that he reasonably believed his symptoms were caused by personal factors, such as a recent marriage and beginning a new job, rather than some external source. In light of the severe physical symptoms which plaintiff admittedly began noticing as early as the mid-1960s -- including bleeding sinuses, dizziness, and memory loss -- and the undisputed fact that the symptoms only manifested themselves after plaintiff's initial exposure to TCE, the district court was correct in concluding that the highly improbable scenario presented by plaintiff was insufficient to raise an issue of fact for the jury.

Larson's arguments to the contrary fail to recognize that it is *Larson's* burden to establish due diligence. The Utah Supreme Court has noted that, before a court need make any determination regarding applicability of a discovery rule, a plaintiff must make a showing -- "as a threshold matter" -- that he or she did not know the facts giving rise to the cause of action, and could not learn them through the exercise of due diligence. O'Neal v. Division of Family Services, State of Utah, 821 P.2d 1139, 1144; Warren v. Provo City Corp., 838 P.2d 1125, 1129 (Utah 1992) ("an initial showing must be made that the plaintiff did not know of and could not reasonably have known of the existence of the cause of action in time to file a claim within the limitation period.")

Absent evidence necessary to satisfy his initial burden of demonstrating reasonable diligence, Larson may not invoke the "discovery" exception to avoid the statute of limitations. As in Warren, the plaintiff here "has not alleged any facts demonstrating that he undertook reasonable steps to investigate [the defendant's] liability. Therefore, as a matter of law, the plaintiff has not shown that he could not have reasonably known about the cause of action in time to file his claim within the statutory period." *Id.* at 1129.

Application of these well-established principles is dispositive of Larson's challenge to the district court's ruling. As the district court noted, "[t]his was not a case wherein the disease or ailment laid dormant or was latent before manifesting its symptoms; therefore, plaintiff would have no reason for not pursuing medical attention or filing a suit at an earlier time." The court reached its determination in light of the uncontroverted fact that all of Larson's symptoms manifested themselves shortly after the exposure to TCE, but by his own admission Larson did not pursue medical attention or make any real attempt to learn what was causing his physical and emotional problems for some twenty years.

Larson misses the point distinguishing cases by emphasizing his own claimed ignorance of a causal link. The actual point is that Larson did nothing to find out what was causing his alleged symptoms, unlike the plaintiffs in Williams, Pereira, Mann v. A.H. Robins Co., 741 P.2d 79 (5th Cir. 1984), and Hando v. PPG

Industries, 771 P.2d 956 (Mont. 1989), all cited by Larson. Larson's alleged fear of doctors cannot excuse his duty to exercise due diligence. *Cf.* O'Neal, *supra* (psychological inability to disclose abuse insufficient to toll statute).

Larson argues, however, that the district court impermissibly made findings of fact based upon the evidence presented to it. While Larson does not point to a particular finding of fact by the court, he argues that "taking oral testimony is inconsistent with the rule that the Court on summary judgment may not weigh the evidence, determine credibility issues, nor make findings." (Brief of Appellant at 22). The difficulty with Larson's argument is that it fails to recognize the purpose of the hearing held by the district court. The transcript of the hearing (R.556) and the district court's Memorandum Decision (R.520) refute Larson's characterization of the district court's actions. The court provided Larson with a generous opportunity to present live (and thus presumably more extensive) evidence on the primary issue raised in the motion for summary judgment: whether Larson could present sufficient evidence to raise a genuine issue of material fact to avoid application of the statute of limitations.

Nowhere in the hearing transcript, Memorandum Decision, or Order and Judgment is there any suggestion that the district court "resolv[ed] factual matters against plaintiff," as Larson claims. The court could have read the deposition testimony of Larson and his wife and reached the same conclusion. The court simply

determined that the evidence was insufficient to raise a genuine issue of material fact. Sufficiency of the evidence to submit an issue to the jury is a question of law, not of fact. Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985).

III. LARSON FAILED TO ESTABLISH EXCEPTIONAL CIRCUMSTANCES JUSTIFYING APPLICATION OF THE DISCOVERY RULE IN ANY EVENT.

Even if Larson had met the threshold showing of due diligence, Larson would then have to establish that exceptional circumstances warranted invocation of the discovery rule. The Utah Supreme Court has observed that courts may find the discovery rule applicable under three circumstances. O'Neal, *supra*, at 1143; Klinger v Kightly, 791 P.2d 868 (Utah 1990). The first two, where the discovery rule is mandated by statute or a defendant has taken steps to conceal the cause of action, are not argued by Larson.

Under the third circumstance, "without regard to any showing that the defendant has prevented the discovery of the cause of action, the discovery rule may be applied where the case presents 'exceptional circumstances or causes of action where the application of the general rule would be irrational or unjust.'" O'Neal, *supra*, 821 P.2d at 1143, *quoting* Myers, *supra*, 635 P.2d at 86. The party seeking to avoid the statute of limitations bears the burden of proving the existence of such exceptional circumstances. O'Neal, *supra*, 821 P.2d at 1144.

Larson failed to offer any evidence or argument demonstrating the existence of exceptional circumstances. In fact, the

circumstances of the case militate against such a finding. If ever there was a case warranting application of the statute of limitations, this is it. Such statutes "are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Myers, *supra*, 635 P.2d at 86, *quoting* Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed.2d 788 (1944).

Larson allowed 24 years to pass from the date of his exposure to TCE before filing suit. Many of the symptoms of which he complains were known to him as early as 1964; all of them were known to him by 1972. His only stated excuse for not exploring the cause of the symptoms was distrust of doctors. Both the law and the facts of this case demonstrate the correctness of the district court's conclusion that Larson's claims were barred by the statute of limitations.

IV. SUMMARY JUDGMENT WAS ALSO APPROPRIATE BECAUSE PLAINTIFF HAD NOT ADDUCED SUFFICIENT EVIDENCE OF CAUSATION.

In his memorandum decision, the district court also noted that Larson had no evidence that his alleged injuries were caused by exposure to TCE. As the district court noted, "the health care providers have not been able to definitely state that any of the plaintiff's symptoms are the result of his exposure to TCE." (R.531).

Dismissal of Larson's action for insufficient evidence of causation was warranted under the precedent of this Court and the Utah Supreme Court. The alleged long-term effects of a chemical compound such as TCE, and the actual cause of Larson's various medical complaints, are subjects not within the ordinary knowledge of a layperson. Absent expert medical testimony, no genuine issue of material fact existed on this issue. Reeves v. Geigy Pharmaceutical, Inc., 764 P.2d 636, 640 (Utah App. 1988) (expert medical testimony required to establish that skin injuries were caused by prescription drugs); *cf.* King v. Searle Pharmaceuticals, Inc., 832 P.2d 858, 864-65 (Utah 1992).

The need for expert testimony is particularly great in this type of case, where a determination of causation would require elimination of other likely causes, such as exposure to various other chemicals over the intervening years. Moreover, the causative elements might differ for particular individual conditions, which would be difficult for a lay jury to distinguish without assistance from a medical expert.

Larson's own physicians would not state that Larson's symptoms were probably caused by TCE, and Larson did not offer any other medical evidence. "Where the proximate cause of an injury is left to speculation, the claim fails as a matter of law." Mitchell, *supra*, 697 P.2d at 246, *quoting* Staheli v. Farmers' Cooperative of Southern Utah, 655 P.2d 680, 684 (Utah 1982). In this case, a determination that Larson's alleged injuries were caused by

exposure to TCE would have been nothing but speculation. Larson's complaint was subject to dismissal for failure to adduce sufficient evidence of causation.

CONCLUSION

For the reasons set forth above, appellees respectfully request that the district court's judgment and order be affirmed.

DATED this 9th day of July, 1993.

CHRISTENSEN, JENSEN & POWELL, P.C.

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PPG Industries, Inc., and
Diamond Shamrock Company

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of July, 1993, two true and correct copies of the foregoing **BRIEF OF APPELLEES PPG INDUSTRIES, INC. AND DIAMOND SHAMROCK CHEMICALS COMPANY** were mailed, first-class postage prepaid, to:

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ROBERT C. LARSON,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. C-88-5604
vs.	:	
PPG INDUSTRIES, INC., a Pennsylvania Corporation, et al.,	:	
Defendants.	:	

An evidentiary hearing was held on June 3, 1991 pursuant to Motions filed by the defendants Diamond Shamrock Chemicals Co. and PPG Industries. Plaintiff was represented by Stanley R. Smith. Defendants PPG and Diamond Shamrock were represented by Jay E. Jensen. Defendant Retep Corporation was represented by Alma G. Peterson. The causes of action against Thatcher Chemical Co. and Wasatch Chemical Co. were heretofore dismissed with prejudice.

The Court heard the testimony of witnesses, read the Memoranda filed and took the matter under advisement. For some unknown reason the file was returned to the clerk's office without the Motion for Summary Judgment being ruled upon and counsel advised accordingly. The Court now enters its ruling.

The plaintiff claims that during the years 1964 through 1974 he was exposed to the chemical trichloroethylene ("TCE") while being in the employment of Black and Decker as a tool repairman.

TCE was used to clean power tools. Employees, when using TCE, had available for their protection rubber gloves, air purifying respirators and ready access to a washroom. Plaintiff did not use the respirator at all times or wash his hands regularly when working with the TCE.

Within a few months after being employed by Black and Decker, plaintiff began to experience physical and emotional symptoms, such as headaches, bleeding from the sinuses, dizziness, mood changes, irritability, lack of sex drive, memory loss, and he became abusive with his wife and family. Even though one or more of these symptoms manifested themselves, plaintiff did not seek medical attention.

Plaintiff contends that while watching a television program in 1984 he was alerted to the potential harmful effects of TCE. However, it was not until some four years later that he filed this action.

The issue presented to the Court is whether or not plaintiff's cause of action is barred by the statute of limitations.

Plaintiff contends that the statute of limitations did not begin to run until plaintiff saw the television program in 1984, about TCE which made him aware of his claim for injuries.

The Court agrees that in some instances the statute does not begin to run until discovery of the cause of the injury is made by the claimant.

The credible evidence leads the Court to find that the symptoms manifested themselves shortly after the exposure to TCE, but plaintiff did not pursue medical attention or attempt to learn what was causing his physical and emotional problems.

This was not a case wherein the disease or ailment laid dormant or was latent before manifesting its symptoms; therefore, plaintiff would have no reason for not pursuing medical attention or filing a suit at an earlier time.

Plaintiff has been unable to ascertain the date he and his wife saw the television program in which the effects of TCE were discussed. In addition, the health care providers have not been able to definitely state that any of the plaintiff's symptoms are the result of his exposure to TCE.

The Court concludes that these defendants' Motion for Summary Judgment should be granted.

The Court refers the parties to these defendants' Memorandum and Reply Memorandum for additional reasons why the Motion for Summary Judgment should be granted.

Dated this 5 day of December, 1991.

John A. Rokich

JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 12 day of December, 1991:

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ROBERT C. LARSON, Plaintiff, v. PPG INDUSTRIES, INC., a Pennsylvania corporation; DIAMOND SHAMROCK CHEMICALS COMPANY, a Delaware corporation; THATCHER CHEMICAL COMPANY, a Utah corporation; WASATCH CHEMICAL COMPANY, a Utah corporation; and RETEP CORPORATION, a Utah corporation, Defendants.	ORDER AND JUDGMENT Civil No. C88-05604 Judge John A. Rokich

The Motion for Summary Judgment filed by defendants PPG Industries, Inc., and Diamond Shamrock Chemicals Company, on or about May 25, 1990, came on for hearing before the Honorable John A. Rokich on July 30, 1990. The plaintiff was represented by Stanley R. Smith and defendants PPG and Diamond Shamrock were represented by Phillip S. Ferguson. Retep was present through its President, Alma G. Peterson, although it was not represented by counsel. Retep joined in the Motion in open Court. The Motion was held in abeyance for 90 days pending further discovery by the plaintiff. It came on for hearing a second time on January 7,

1991. Before ruling on the Motion for Summary Judgment, the Court elected to conduct an evidentiary hearing which occurred on June 3, 1991. Retep was neither present nor represented at the evidentiary hearing. The Court, having studied the memoranda filed by the parties, having considered the testimony offered by plaintiff and defendants on the issue of the statute of limitations, and being otherwise fully advised in the premises, now enters the following Order and Judgment:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The statute of limitations applicable to this case is § 78-12-25(3), the general four year statute of limitations.

2. The statute of limitations ordinarily begins to run when the last event giving rise to the cause of action occurs which, in this case, was no later than December 31, 1974.

3. The recognized exceptions to the general rule regarding the commencement of the statue of limitations, collectively known as the discovery rule, do not apply in this case because (a) there is no provision for the application of the discovery rule within the statute itself; (b) it is undisputed that plaintiff was aware of all of the symptoms of which he now complains by 1974, most of them within months of his first exposure to TCE in 1964 and 1965; (c) although plaintiff sought occasional medical attention for his various symptoms, it is undisputed that plaintiff made no effort to learn the cause of his symptoms until several weeks after viewing an unidentified television program in 1984; (d) there is no evidence that defendants concealed or misled or attempted to

conceal or mislead or otherwise prevent plaintiff from learning any information about trichlorolethylene and the potential side effects, if any, caused by exposure to trichlorolethylene in the work place environment; (e) there are no exceptional circumstances which prevented plaintiff from seeking treatment and filing suit many years earlier than he did.

4. To the extent the discovery rule may be applicable to this case, plaintiff's delay of fourteen to twenty-four years before making any effort to learn the cause of his symptoms was not justified, and reasonable minds cannot differ with regard to whether plaintiff should have made an attempt to determine whether his symptoms were caused by exposure to trichlorolethylene prior to viewing the unidentified television program sometime in 1984.

5. Plaintiff's long delay in attempting to connect his symptoms with his exposure to trichlorolethylene has made it virtually impossible for the parties to discover credible evidence regarding who supplied the trichlorolethylene to plaintiff's employer, whether all applicable instructions and warnings were transmitted by the distributors to the employer, whether the plaintiff was exposed to other chemicals, toxic substances, or circumstances which could account for his symptoms, and whether the symptoms from which plaintiff suffers were caused by exposure to trichlorolethylene, all of which constitutes serious prejudice to the defendants should plaintiff be allowed to pursue his claim.

6. For all other reasons set forth in the Memorandum in Support of their Motion for Summary Judgment and their Reply

Memorandum in Support of their Motion for Summary Judgment, the Court hereby grants defendant's Motion for Summary Judgment and Judgment is entered herewith in favor of the defendants and against the plaintiff, no cause of action. Defendants are awarded their costs incurred herein.

DATED this 17 day of January, 1992.

BY THE COURT:

John A. Rokich

John A. Rokich
District Court Judge

APPROVED AS TO FORM:

Stanley R. Smith
Attorney for Plaintiff